No. 90-1390

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION, PETITIONER

v.

EVERT ROMEIN, ET AL., RESPONDENTS

FORD MOTOR COMPANY, PETITIONER

v.

ARTURO GONZALEZ, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

In 1981, the State of Michigan enacted a statute providing that the amount of workers' compensation benefits paid after March 31, 1982, would be reduced by the amount of any other employer-financed income replacement benefits, such as pensions. In 1985, the Michigan Supreme Court ruled that this statute applied to all workers' compensation payments, whether the employees were injured before 1982 or thereafter. In 1987, however, the Michigan legislature amended the 1981 statute retroactively, eliminated the offset provision as applied to pre-1982 injuries, and required employers to reopen all such claims paid between 1982 and 1987 and to refund, with interest, any amounts that were lawfully withheld pursuant to the 1981 statute.

The questions presented are as follows:

1. Whether the 1987 Michigan statute retroactively imposing liability for additional workers' compensation benefits for closed disability periods violates the Impairment of Contracts Clause (Art. I, § 10) of the United States Constitution.

2. Whether the 1987 Michigan statute retroactively imposing liability for additional workers' compensation benefits for closed disability periods violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties listed in the caption, Frank J. Kelley, the Attorney General of Michigan, intervened in these cases, was an appellee in the Supreme Court of Michigan, and is a respondent in this Court. Ford Motor Company's non-wholly-owned subsidiaries are listed at Pet. App. 93a-96a. General Motors Corporation's non-wholly-owned subsidiaries are listed at Pet. App. 97a-101a.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the Supreme Court of Michigan (Pet. App. 1a-57a) is reported at 436 Mich. 515, 462 N.W.2d 555. The decision of the Michigan Court of Appeals (Pet. App. 58a-69a) is reported at 168 Mich. App. 444, 425 N.W.2d 174.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on September 28, 1990 (Pet. App. 1a) and a petition for rehearing was denied on December 5, 1990 (*id.* at 72a). The petition for a writ of certiorari was filed on March 5, 1991, and was granted on May 13, 1991. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution and the Michigan workers' compensation statute are set forth at Pet. App. 88a-92a.

STATEMENT

From 1982 to 1987, petitioners—employers in the State of Michigan—satisfied their contractual obligations to pay workers' compensation benefits to disabled employees by making full payments in the amounts provided by the state workers' compensation statute as authoritatively construed by the Supreme Court of Michigan. In 1987, however, the Michigan legislature, expressly disagreeing with the state supreme court's construction of state law, enacted a new statute that retroactively increased the amount of workers' compensation benefits for payment periods back to 1982. The issue in this case is whether the 1987 law, imposing massive unforeseen financial obligations on employers, is consistent with the requirements of the Contract Clause and the Due Process Clause of the United States Constitution.

1. *The 1981 Statute.* During the late 1970s and early 1980s the State of Michigan was mired in an economic crisis. As Chief Justice Riley described the situation: "Michigan had been struggling through a severe recession. A significant number of businesses either were closing down their local operations or leaving the state. The unemployment rate in Michigan during December 1981, was 14.4 percent, and the 1981 inflation rate for the City of Detroit in 1981 was 9.3 percent." Pet. App. 31a-32a (Riley, C.J., dissenting). It was against this economic backdrop that the Michigan legislature in 1981 passed a series of amendments to the Michigan Workers' Compensation Act. These changes were designed to curb expensive abuses in the system and thereby to "stimulate a poor state economy by lowering the cost of doing business in Michigan." *Id.* at 31a.

The primary abuse that the 1981 statute addressed was the ability of retired employees to collect workers' compensation benefits in addition to retirement benefits, and thereby to earn more money "disabled" than they would have received if they had never been injured. As the Michigan Supreme Court explained:

> For many years the most hotly discussed topic concerning the Michigan workers' compensation system was the so-called "retiree problem." * * * If the retiree could demonstrate that he or she had incurred a disability caused by pre-retirement job activity or working environment (a bad back from 30 years on the assembly line or a dust disease from 30 years in a foundry), the retiree was entitled to workers' compensation. * * * In 1973 the Big Three (General Motors, Ford and Chrysler) paid out $51 million in wage loss benefits, of which $24 million, or 47 percent, went to retirees. * * * With such a large part of the compensation dollar going to persons who were no longer part of the active work force, it was inevitable that reforms would be demanded.

Franks v. *White Pine Copper Div.*, 375 N.W.2d 715, 724 (1985) (quoting official state study; citation omitted).

Indeed, in 1981, Michigan Governor William Milliken called the "retiree problem" the "biggest single liability to Michigan's job climate today." *Id.* at 723.

The Michigan legislature responded to this crisis by enacting 1981 PA 203 on December 30, 1981. This statute added MCL 418.354 to provide for the "coordination" of workers' compensation benefits with various other employee benefit programs funded by employers.[1] For example, the 1981 statute allowed employers to offset workers' compensation payments by the amounts that an employee was otherwise receiving from employer-financed pension plans, employer contributions to social security, or payments received from an employer-provided disability policy. Because of the coordination of benefits, employees would no longer be allowed to "receive wage-loss benefits from two, three, or four different programs providing a total wage 'replacement' greater than the wages the employee earned while on the job." *Franks*, 375 N.W.2d at 723 (quoting official state study). See A. Larson, THE LAW OF WORKMEN'S COMPENSATION § 97.10 (1989) (an employee experiencing wage-loss due to three separate conditions—physical disability, economic unemployment, and old age—is still suffering only one wage-loss and should not receive three simultaneous sets of benefits).[2]

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[1] This statute was one of a series of reforms Michigan instituted during 1980 and 1981. For example, in 1980, the legislature provided for coordination of workers' compensation benefits with unemployment benefits. See 1980 PA 357, MCL 418.358. Also in 1980, the legislature raised the maximum disability benefit for employees injured after January 1, 1982. See MCL 418.351. Another provision of the 1980 amendments created a state-funded cost-of-living supplement for employees injured between 1965 and 1979. See MCL 418.352. These supplemental benefits are not subject to coordination.

[2] As explained in the *amicus curiae* brief of the National Council of Self-Insurers in support of certiorari (at 2-5), coordination of benefits was recommended by the National Commission on State Workmen's Compensation Laws, was adopted by Congress in the Employment Retirement Income Security Act (see *Alessi* v. *Ray-*

2. *Interpretation of the 1981 Statute.* In *Chambers* v. *General Motors Corp.* (reported together with *Franks* at 375 N.W.2d 715 (1985)), the Michigan Supreme Court reviewed the plain language and history of the 1981 statute and held unanimously that the coordination provision applied to all workers' compensation payments made for disability periods *after* the statute's effective date of March 31, 1982, regardless of the date of the employee's injury. The court explained that coordination of future payments did not constitute a retrospective interference with any rights of the employees, because workers' compensation focuses on the workers' needs and status as of each new payment period. See *Chambers*, 375 N.W.2d at 722.

At the same time, however, the Michigan Supreme Court announced that employers could not reduce payments that they still owed employees for disability periods occurring *before* the coordination provision's effective date of March 31, 1982. To allow this type of retrospective coordination, the court explained, would retroactively (and hence impermissibly) adjust payments that were "due" and "payable" prior to the effective date of the statute. *Chambers*, 375 N.W.2d at 730.

3. *The 1987 Amendment.* During the mid-1980s, the economic climate in Michigan improved considerably. As Chief Justice Riley observed, in 1987 "[t]he level of unemployment was 8.2 percent (down from the 1981 level of 14.4 percent), and the 1987 inflation rate for the City of Detroit was 3.0 percent (down from the 1981 level of 9.3 percent)." Pet. App. 35a. Moreover, the Michigan legislature in 1987 was quite different from the one that had passed the coordination provision in 1981. Only 11 of the 26 senators and 20 of the 62 representatives who had voted for the 1981 statute were still in office. See *id.* at 36a.

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bestos-Manhattan, Inc., 451 U.S. 504 (1981)) and the Social Security Act (see *Richardson* v. *Belcher*, 404 U.S. 78 (1971)), and has been accepted by 25 states in their workers' compensation programs.

In this changed economic and political environment, the Michigan legislature revisited the coordination issue in 1987 and enacted an amendment to the workers' compensation statute designed to overrule the Michigan Supreme Court's decision in *Chambers* and to disallow coordination of benefits for employees who had been injured prior to the 1981 statute's effective date of March 31, 1982. See Pet. App. 90a-92a. The amendment explicitly stated:

> The decision of the Michigan Supreme Court in [*Chambers*] is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability * * * for personal injuries occurring before March 31, 1982.

1987 PA 28, section 354, subsection 17.

The 1987 amendment did far more, however, than merely abolish coordination of *future* workers' compensation payments for employees disabled prior to March 31, 1982. The 1987 legislature also repealed the 1981 coordination provision *retroactively* by requiring employers to make *refunds*, with interest, to all employees whose benefits had been coordinated during the five-year period that the 1981 statute was in effect. See 1987 PA 28, section 354, subsections 19 & 20. Employers were given 60 days to make these massive refunds, which in the case of petitioners GM and Ford alone could amount to nearly $25 million. See Pet. App. 53a (Griffin, J., dissenting).

4. *The Romein and Gonzalez Cases.* Evert Romein was injured in 1977 during his employment with General Motors. Prior to the 1981 statute, Romein received social security and pension benefits as well as workers' compensation benefits on account of his disability. After the effective date of the 1981 statute, GM informed Romein that it would begin coordinating his workers' compensation benefits with these other employer-financed payments. Romein challenged this decision, and an administrative law judge ruled in his favor, holding that the coordina-

tion provision applied only to employees who were injured after its effective date of March 31, 1982. By the time the case was heard by the Workers' Compensation Appeal Board (WCAB), the Michigan Supreme Court already had rejected this argument in *Chambers*, and the WCAB therefore ruled that GM was entitled to coordinate payments to Romein for periods after the 1981 statute's effective date. Pet. App. 74a-80a.

Arturo Gonzalez, a Ford employee, began to receive workers' compensation benefits on January 1, 1981. On August 9, 1982, Ford informed Gonzalez that his benefits would be reduced in light of the 1981 statute. In September 1984, however, an administrative law judge ruled against Ford, holding that the coordination provision could not be applied to pre-1982 injuries. The WCAB affirmed. The Board concluded that although *Chambers* had construed the 1981 statute to permit the coordination of Gonzalez's benefits, that decision had been "reversed" by the 1987 amendment. Pet. App. 81a-87a.

5. *The Court of Appeals' Decision.* The *Romein* and *Gonzalez* cases were consolidated by the Michigan Court of Appeals, which held that retroactive application of the 1987 amendment did not violate the Due Process or Impairment of Contracts Clauses of the United States Constitution. Pet. App. 64a-66a. The court reasoned that "[t]he right to coordinate workers' compensation benefits relied upon by GMC and Ford was conferred by the Legislature and was revoked by the Legislature. What the Legislature gave, it could take away." *Id.* at 66a.

6. *The Michigan Supreme Court's Decision.* A divided Michigan Supreme Court affirmed. The majority first rejected petitioners' contention that the 1987 amendment violated due process. In the court's view, GM and Ford acquired no "vested rights" in the level of payments they had made because "workers' compensation benefits and liabilities are statutory in origin and may be revoked or modified at the will of the Legislature." Pet. App. 13a. The court recognized that the

> employers in this case held an expectation that the payments [made between 1982 and 1987] were completed transactions. We do not accept, however, their contention that if parties have patterned their past conduct in reliance on past law, they have a vested right to have the legality of that conduct determined under law then in effect. The rational relationship test applies to economic legislation whether it is retroactive or not.

Id. at 9a. The court found such a "rational relationship" by hypothesizing that the legislature may have wanted to ensure that employees who were not covered by a 1980 statute that increased benefits for injuries occurring after 1982 (see page 3, note 1, *supra*) would not be subject to coordination of benefits. Pet. App. 9a.

The Michigan Supreme Court also rejected petitioners' argument that the 1987 amendment worked an unconstitutional impairment of the contractual arrangements between employers and their employees. The court first ruled that "benefits and liabilities in the workers' compensation statute do not create rights protected by the Contract Clause." Pet. App. 14a. Even if the Contract Clause applied, however, the court concluded that the 1987 legislation would survive scrutiny. To begin with, the court held that any impairment caused by the statute was not "substantial" because it did not destroy the "basic benefit" that employers received from the workers' compensation scheme—immunity from tort actions by their employees. *Id.* at 15a. In addition, the court suggested that any impairment was diminished by the "highly regulated" nature of the employment relationship. *Id.* at 15a-16a.

The Michigan Supreme Court next considered whether any impairment of contract could be justified by a "legitimate public purpose" and concluded that "[t]here is a significant state interest in protecting the right of disabled employees." Pet. App. 16a. Again speculating on the motivation for the 1987 amendment, the court stated that "[t]he Legislature could have reasonably found that

the coordination of benefits caused hardship among the employees whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." *Id.* at 17a.

Finally, the Michigan Supreme Court considered the "means by which the contracting parties' rights and responsibilities [were] adjusted" and determined that "[t]he means chosen here are reasonable in the light of deference given to legislative action." Pet. App. 17a. The court explained that "the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." *Ibid.*

Justice Brickley "reluctantly" concurred in the judgment. He stated that

> [t]roubled though I am by the 1987 amendments at issue here, reaching back as they do to rewrite the past by altering the past consequences of past transactions, the lamentable failure of the United States Supreme Court to articulate any discernible limits on the constitutionality of retroactive civil, economic legislation forecloses the conclusion that the 1987 amendments violate the Due Process Clause of the Fourteenth Amendment.

Pet. App. 22a.

Justice Griffin dissented, based on his "strong view" that the 1987 amendment "contravenes the United States Constitution's Fourteenth Amendment due process guarantee." Pet. App. 47a. After reviewing some of the retroactive enactments that have survived judicial scrutiny in the past, Justice Griffin remarked that the "[l]egislation scrutinized in those cases does not compare to the enactment here which was deliberately designed to disrupt retroactively past transactions completed in reliance upon this Court's specific holding in *Chambers* that all workers' compensation payments were subject to * * * coordination regardless of the date of injury." *Id.* at 50a.

Chief Justice Riley dissented on state law grounds. She observed that the 1987 amendment "was nothing more than an attempt to 'overrule' the decision of this Court in *Chambers*, to render the *Chambers* opinion null and void, as if it was never released." Pet. App. 42a. In so doing, Chief Justice Riley concluded, "the Legislature has invaded the constitutional authority granted to the judicial branch and usurped the judicial function of determining the proper construction of a statute." *Id.* at 30a.

SUMMARY OF ARGUMENT

One of the cardinal purposes of the federal Constitution was to ensure a level of legal stability necessary for citizens to plan their affairs, secure in the expectation that their actions today would not be evaluated by different legal standards tomorrow. This concern with protecting citizens from "the fluctuating policy which has directed the public councils" (FEDERALIST No. 44 (Madison), at 282 (C. Rossiter ed. 1961)) manifested itself in a number of specific constitutional guarantees, including the Contract Clause and Due Process Clause. The Michigan Supreme Court ignored the dictates of these provisions, and this Court's decisions interpreting them, when it upheld the Michigan statute's retroactive requirement that petitioners reopen long-settled workers' compensation claims and make massive payments for past pay periods in addition to those required by the law in effect at the relevant time.

Petitioners and respondents entered into employment contracts that incorporated the terms of the workers' compensation laws. By retroactively upsetting those terms, the Michigan statute directly implicated the protections of the Contract Clause. The significant impairment brought about by the 1987 statute cannot possibly be viewed as insubstantial, and the Michigan legislature did not attempt to justify that impairment by asserting any important governmental interest. It follows that the statute is unconstitutional under the balancing test that this Court has applied in reviewing Contract Clause chal-

lenges in recent years. The statute is even more clearly unconstitutional under a legal standard that more faithfully reflects the original intent of the Framers.

The Michigan statute also violates the Due Process Clause because it constitutes a purely retroactive enactment the explicit purpose of which was to overrule the decision of an earlier legislature, as construed by the State's highest court, and to upset settled transactions and expectations. Although there may be occasions in which a legislature can proffer constitutionally acceptable justifications for a statute that includes a short period of retroactivity, neither the purpose nor the sweeping retroactive reach of the statute at issue here comes close to satisfying the criteria articulated in this Court's prior rulings.

ARGUMENT

I. THE 1987 MICHIGAN AMENDMENT VIOLATES THE CONTRACT CLAUSE, WHICH PROHIBITS A STATE FROM RETROACTIVELY REOPENING SETTLED WORKERS' COMPENSATION CLAIMS YEARS AFTER PAYMENTS HAVE BEEN MADE IN COMPLIANCE WITH THE LAW THEN IN EFFECT

A. The Terms Of State Workers' Compensation Statutes Are Read Into Every Employment Contract And Thus Create Interests Protected By The Contract Clause

In holding that the retroactive increase in workers' compensation liabilities did not violate the Contract Clause, the Michigan Supreme Court relied on the ground that "the [employers'] expectation at issue here was not protected by the Contract Clause." Pet. App. 14a. This conclusion is plainly incorrect and cannot be reconciled with the numerous decisions of this Court that have applied the Contract Clause to contractual terms implied from state statutes.[3]

[3] The question whether an "obligation of contract" exists within the meaning of the Contract Clause, no less than the question whether there has been an "impairment" of that obligation, is a matter of *federal* rather than state law. As this Court explained in *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938), "in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation." The Court "must answer * * * [t]hese questions * * * independently of the conclusion of th[e state] court," for "we can not perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration." *Appleby* v. *City of New York*, 271 U.S. 364, 379-380 (1926). See also, *e.g.*, *Municipal Investors Ass'n* v. *Birmingham*, 316 U.S. 153, 157 (1942); *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561-562 (1942).

This Court's Contract Clause decisions long have recognized that " 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' * * * This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19-20 n.17 (1977), quoting *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 429-430 (1934), and *Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535, 550 (1867). In *Steamship Co.* v. *Joliffe*, for example, a state statute provided that a harbor pilot whose services were declined was entitled to receive half the pilotage fee; the purpose of the statute was to compensate the pilot "for the exertions and labor made * * * and the expenses and risks incurred * * * in placing himself in a position to render the services." 69 U.S. (2 Wall.) 450, 457 (1864). After plaintiff's services were refused, he sued in state court to recover the half-fee provided by the statute. Subsequent to commencement of the suit, however, the statute was repealed, which the state argued eliminated plaintiff's claim. The Court rejected this argument, emphasizing that plaintiff's right, by virtue of performance, was contractual rather than statutory in nature (*id.* at 456-457):

> The claim to half-pilotage fees, it is true, was given by the statute, but only in consideration of services tendered. * * * If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less than a contract on that account. If the services * * * are declined, * * * [t]he transaction * * * between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract.

Because plaintiff's claim rested on "*quasi* contract" and had been "so far perfected [by performance] that nothing remains to be done by the party asserting it," "[i]t has become a vested right which stands independent of the statute." *Id.* at 458.

The Court has adhered to this analysis in cases specifically involving terms of employment implied from state statutes. In *Fisk* v. *Jefferson Police Jury*, 116 U.S. 131 (1885), a district attorney brought suit to recover his salary and fees in the amount set by statute. Although recognizing that the legislature could change such compensation prospectively (*id.* at 133), the Court held that plaintiff had a right under the Contract Clause to receive the amount specified in the statute for services already performed: "after the services have been rendered, under a law * * * which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate." *Id.* at 134. In reaching that conclusion, the Court expressly rejected the argument that the Contract Clause does not reach contractual obligations implied in law (*ibid.* (emphasis added)):

> The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid

> money, rendered service, or suffered loss at the request of or for the use of another, *the law completes the contract by implying an obligation* on the part of the latter to make compensation. *This obligation can no more be impaired by a law of the State than that arising on a promissory note.*

Thus, as the Court later reiterated in holding that a retroactive legislative reduction in an employee's statutorily-prescribed compensation violated the Contract Clause, performance pursuant to a statute "then in force [that established the parties' rights and duties] as construed by the highest court in the state" gives rise to "an implied contract * * *. And the constitutional protection [against the impairment of the obligations of contract] extends to such contracts just as it does to those specifically expressed." *Mississippi ex rel. Robertson* v. *Miller*, 276 U.S. 174, 179 (1928). See also *Koshkonong* v. *Burton*, 104 U.S. 668, 679 (1882); J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 499 (1987 ed.) (contracts "are express, or implied," and the Contract Clause "makes no distinction between the one class of contracts and the other").[4]

These principles apply with full force in the context of workers' compensation. The workers' compensation statute "is read into and becomes a part of the contract. The contract of employment, by virtue of the statute, contains an implied provision * * * [that] is a part of the compensation agreed to be paid for services rendered in the course of the employment." *State Industrial Comm'n*

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[4] In a number of other cases, the Court similarly has held that the Contract Clause was violated by a statute modifying the law that was implicitly incorporated in a contract. See, *e.g.*, *Wood* v. *Lovett*, 313 U.S. 362, 369-372 (1941); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938); *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935); *W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 431-432 (1934); *Coombes* v. *Getz*, 285 U.S. 434, 442, 448 (1932); *Douglass* v. *County of Pike*, 101 U.S. 677, 687 (1880); *Edwards* v. *Kearzey*, 96 U.S. 595, 601, 607 (1877); *Walker* v. *Whitehead*, 83 U.S. (16 Wall.) 314, 317-318 (1873).

v. *Nordenholt Corp.*, 259 U.S. 263, 271 (1922) (quoting *Doey* v. *Howland Co.*, 120 N.E. 53, 54 (N.Y. 1918)). See also *Nacerima Co.* v. *Johnson*, 396 U.S. 212, 215 n.5 (1969). It is thus hardly surprising that the Michigan Supreme Court has repeatedly recognized in the past that "the basis for liability of employers under the Workmen's Compensation Statutes is contractual." *Selk* v. *Detroit Plastic Products*, 345 N.W.2d 184, 188 (Mich. 1984).[5]

Much like minimum wage statutes, workers' compensation laws establish minimum terms that are included (expressly or by implication from the statute) in every employment contract. Such statutes are not general police power regulations that govern businesses without regard to their contractual agreements to employ workers. Rather, the terms of workers' compensation statutes come into play only in conjunction with the contractual employment agreement. "Before benefits or rights under the workmen's compensation act can be claimed, an employer-employee relationship, established by a contract of employment, must be shown to exist." *Erickson* v. *Goodell Oil Co.*, 380 Mich. 207, 180 N.W.2d 798, 799 (1970); see also *Scott* v. *Alsar Co.*, 58 N.W.2d 910, 912 (Mich. 1953); 1C A. Larson, THE LAW OF WORKMEN'S COMPENSATION § 47.10 (1990).

[5] See also, *e.g.*, *Lahti* v. *Fosterling*, 99 N.W.2d 490 (Mich. 1959); *Thomas* v. *Parker Rust Proof Co.*, 279 N.W. 504 (Mich. 1938); *Brown* v. *Eller Outdoor Advertising Co.*, 360 N.W.2d 322 (Mich. App. 1984). In departing from this line of authorities, the court below purported to rely on *Chambers* v. *General Motors Corp.*, 375 N.W.2d 715, 723 (Mich. 1985), for the proposition that "benefits and liabilities in the workers' compensation statute do not create rights protected by the Contract Clause" (Pet. App. 14a). *Chambers*, however, held only that a legislative reduction in *future* benefit payments did not violate employees' constitutional rights. See 375 N.W.2d at 723; compare *id.* at 728-732 (in *Franks*, the Michigan Supreme Court held that workers' compensation benefits could not be retroactively reduced). Nothing in *Chambers* or in its unexplained extension in this case refutes the prior Michigan law that workers' compensation is an implied contractual term of employment.

The contractual nature of workers' compensation is highlighted by the fact that employers and employees (generally through their collective bargaining representatives) frequently bargain around the statutory minimums. For example, the contracting parties often bargain for enhanced disability benefits or agree to shape other benefit provisions, such as by decreasing pension or insurance benefits, to take account of workers' compensation levels. See, *e.g.*, Supplemental Agreement Covering Pension Plan, Art. IV, sec. 2, Appendix A to Agreement between GM and UAW (Mar. 21, 1982).[6] And employers take into account workers' compensation expenses (*i.e.*, insurance premiums or anticipated benefit payments for self-insured companies) when they calculate how much labor they can afford and when they bargain over wage rates and other benefits.

Of course, not every legislative modification of workers' compensation benefit levels is an unconstitutional impairment of contract, but the approach of the court below takes the law to the opposite and equally untenable extreme. In the Michigan court's view, *no* legislative change in benefit levels—even if enormously significant, completely retroactive, and severely disruptive of settled contractual expectations for a long-past period—would be subject to judicial scrutiny under the Contract Clause. That is not and cannot be the law. Surely if a state increased (or decreased) its minimum wage rate and made

[6] According to the Bureau of National Affairs' ongoing compilation of collective bargaining agreements, 27% of the contracts examined provided occupational accident insurance to supplement workers' compensation benefits. 2 BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS 44:4 (1991). Twenty-one percent of the agreements provided for long-term disability insurance (*ibid.*) and 70% made some provision for coordination of medical benefits with other insurance or government benefits. *Id.* at 44:9. Ninety percent of the contracts provided for disability pensions above and beyond workers' compensation, and in 17% of those contracts (26 out of 149) the parties agreed that workers' compensation benefits would be deducted from the disability retirement benefits. *Id.* at 48:3.

that increase (or decrease) retroactive to services already performed and paid for, employers (or employees) would have a Contract Clause claim. There is no reason why a different result should occur when the state retroactively increases another minimum statutory term of employment contracts—that relating to workers' compensation.

B. The Impairment In This Case Violates The Contract Clause

Perhaps because it recognized the tenuousness of its conclusion that no contractual interest was at stake here, the Michigan Supreme Court proceeded to decide whether the impairment caused by the 1987 amendment could be justified under the Contract Clause standard that this Court has adopted over the past several decades. See Pet. App. 15a-17a. As discussed below (see pages 28-36, *infra*), this Court's recent "balancing" test departs from the original understanding of the Contract Clause as applied during the first 150 years of the Nation's history. Because such a balancing approach is inconsistent with the text and purpose of the Clause, the Court may wish to reconsider its modern Contract Clause jurisprudence and return the Clause more securely to its historical roots.

Even without a revision in the governing standard, however, the retroactive 1987 amendment cannot pass constitutional muster. As we now show, because the statute worked a substantial and totally unanticipated increase in employers' liabilities for past periods, and because it neither addressed a broad and important public purpose nor adopted a reasonable means for achieving any such objective, the Contract Clause was violated.

1. *Under Existing Constitutional Standards, Michigan's Retroactive Increase In Employers' Liabilities For Workers' Compensation Benefits Violates The Contract Clause*

This Court has recognized "the high value the Framers placed on the protection of private contracts." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 245 (1978). The Contract Clause was intended to safeguard

the reliance and expectation interests necessary to commercial interchange "by promoting confidence in the stability of contractual obligations." *United States Trust Co.*, 431 U.S. at 15.

> Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Steel, 438 U.S. at 245.

In recent years, the Court has developed a three-part balancing test to decide Contract Clause claims. Under this standard, the Court has weighed (1) the substantiality of the contractual impairment (*Energy Reserves Group* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *Allied Steel*, 438 U.S. at 244); (2) the public purpose justifying the impairment (*Energy Reserves*, 459 U.S. at 412); and (3) the reasonableness of the means chosen to achieve that purpose (*United States Trust Co.*, 431 U.S. at 25). In upholding the 1987 amendment, the Michigan Supreme Court fundamentally misconceived each of these three factors.

a. *The Substantiality Of The Contractual Impairment.* "The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment' " of a contractual right. *Energy Reserves*, 459 U.S. at 411, quoting *Allied Steel*, 438 U.S. at 244. The substantiality of the impairment must be evaluated in terms of "the legitimate expectations of the contracting parties." *United States Trust Co.*, 431 U.S. at 19 n.17.

The Michigan Supreme Court clearly erred in concluding (Pet. App. 15a) that the 1987 amendment—which imposed on GM and Ford as much as $25 million in additional workers' compensation liability for *closed benefit periods*—did not amount to a substantial impairment of contract rights. The amendment upset employers' settled expectations and justifiable reliance interests in three important respects.

First, in light of the 1981 statute, particularly as construed by the State's highest court in *Chambers*, employers were entitled to rely on their 1982-1987 coordinated workers' compensation payments to fully satisfy their legal obligations. See *Minnesota Ass'n of Health Care Facilities* v. *Minnesota Dep't of Public Welfare*, 742 F.2d 442, 451 (8th Cir. 1984) (the Contract Clause bars a retroactive (but not prospective) adjustment in nursing home rates because it imposed "totally unexpected liability on nursing homes for charges that were permitted by law when collected" and thus "disrupt[ed] settled and completed financial arrangements under contracts made in reliance on existing law"). Here, the workers' compensation benefits at issue were "due and payable" (*Franks*, 375 N.W.2d at 730)—and in fact were paid—prior to the 1987 amendment. Especially since these benefits were computed on a periodic basis to compensate the employee for lost earnings *during that period*,[7] the reopening of benefits for closed periods violated well-established employer expectations of the most fundamental sort.[8]

Second, employers were entitled to rely on the existing workers' compensation program in making contemporaneous business decisions. The right to workers' compensation is one component of the employees' total wage and benefit package, and employers must be able to—and in Michigan in fact did (see page 15, *supra*)—take the required payment levels into account in setting overall employee compensation. Similarly, the cost of labor (including workers' compensation benefits) affects the quantity of labor employers purchase within the State and the

[7] Michigan workers' compensation benefits are payable weekly and are "geared to weekly wage loss." *Franks*, 375 N.W.2d at 731; see also MCL 418.301.

[8] If the Michigan legislature had sought to *reduce* workers' compensation benefits for such past periods, the retroactive impairment of the *employees'* settled expectations would analytically be no different. See *State ex rel. Cannon* v. *Moran*, 331 N.W.2d 369 (Wis. 1983).

relative capital investment choices (both short-term and long-term) they make. Labor expenses generally are an important element of the price at which the employer sells its products or services—a price that reflects the then-determinable cost of labor and cannot be adjusted years after the fact to recover subsequently enacted and retroactively applicable increases in such costs.

Third, employers were entitled to rely on the existing workers' compensation program in insuring against their risks for employee disability or death benefits. Under Michigan law, an employer is required either to self-insure against workers' compensation liability or to purchase insurance. See MCL 418.611. In either event, sound insurance practices can be followed only if the risks are reasonably ascertainable at the time the cost of the insurance is determined. See Am. Br. of Citizens Insurance Co. of America, *et al.* As this Court has recognized, "the element of reliance" is "vital" in funding insurance obligations, and "[d]rastic changes in the legal rules governing * * * insurance funds, like other unforeseen events," can disrupt the insurance program and even threaten its solvency. *Allied Steel*, 438 U.S. at 246-247. See also, *e.g.*, *Florida* v. *Long*, 487 U.S. 223, 235-236, 238-240 (1988).

The substantial impairment of employers' contractual expectations in this case is closely analogous to that held unconstitutional in *Allied Steel*. There, a 1974 Minnesota statute imposed a charge on employers if their pension funds were insufficient to provide full pensions for all employees who had worked at least 10 years—even those whose pension rights were not vested under existing law. The pension funds were composed solely of employer contributions, which were "based on actuarial predictions of eventual payment needs." 438 U.S. at 237. The Court concluded that the imposition of a "retroactive state-imposed vesting requirement" (*id.* at 247), which "super-impos[ed] pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake" (*id.* at 240), worked a "severe" impairment

of employers' contractual obligations (*id.* at 246) (emphasis added):

> The effect of Minnesota's Private Pension Benefits Protection Act on this contractual obligation was severe. The company was required in 1974 to have made its contributions throughout the pre-1974 life of its plan as if employees' pension rights had vested after 10 years, instead of vesting in accord with the terms of the plan. Thus a basic term of the pension contract—one on which the company had relied for 10 years—was substantially modified. *The result was that, although the company's past contributions were adequate when made, they were not adequate when computed under the 10-year statutory vesting requirement. The Act thus forced a current recalculation of the past 10 years' contributions based on the new, unanticipated 10-year vesting requirement.*

That reasoning is equally controlling here.

In holding that the 1987 amendment did not result in any "substantial" impairment of contract, the Michigan Supreme Court completely ignored the significant reliance interests of employers as recognized in *Allied Steel* and other Contract Clause decisions of this Court. Moreover, neither of the rationales offered by the court below justifies its conclusion.

The Michigan Supreme Court initially observed that the impairment of contract "cannot be said to be substantial" because the 1987 amendment "d[id] not alter th[e] basic benefit to the employer" of the workers' compensation system—immunity from employees' common-law tort claims. Pet. App. 15a. This reasoning is nonsensical; if accepted by this Court, it would allow a state legislature to impose any amount of retroactive workers' compensation liability on employers—or presumably to make any other retroactive modification of the workers' compensation system—provided only that employers remain free from tort suits. Contrary to the Michigan court's conclusion, this Court has expressly held that a "[t]otal destruction of contractual expectations is not necessary

for a finding of substantial impairment." *Energy Reserves*, 459 U.S. at 411, citing *United States Trust Co.*, 431 U.S. at 26 ("[t]he trial court's 'total destruction' test is based on what we think is a misreading of [the Clause]"). The relevant focus is on what the state has taken away from the contracting party, not on what it has left.

The Michigan Supreme Court also relied on the alternative argument that employers "knew that their rights were subject to alteration" because the "workers' compensation statute regulates a field of commerce that has been subject to a wide-ranging and comprehensive scheme of government regulation." Pet. App. 16a. The fact that the employment relationship was "regulated," however, hardly negated the parties' reasonable expectation of finality with respect to *fully satisfied* claims for *past* disability periods. Indeed, the "regulatory" provisions of the Michigan workers' compensation statute specifically reinforced that expectation. The Act provides that benefits are payable weekly to compensate the employee for lost earnings during that week. See note 7, *supra*. It also states that "no compensation shall be ordered for any period which is more than 1 year prior to the date of filing [of an application for additional compensation]." MCL 418.833(1); see also *Franks*, 375 N.W.2d at 730 (refusing to allow retroactive coordination of benefits for pre-1982 periods). Under this scheme, it was well understood that past benefit payments were final and closed.

In fact, in the 75-year history of workers' compensation in Michigan, this was the *first* time the legislature had ever sought to reopen past claim periods to increase employer liability. Given the nature of these periodic payments as compensation for lost wages on an ongoing (and often extended) basis, benefits payable in the future have been and must be capable of adjustment in light of then-existing economic conditions. But payments already due and payable (and in fact paid) to assist employees for periods many years past have never been thought to be, and never have been, subject to reopening.

Thus, Michigan employers had a justifiable expectation that their liability for *past* periods could not be retroactively increased.[9]

Accordingly, the 1987 amendment substantially impaired the contractual rights of Michigan employers. "The severity of the impairment * * * increase[s] the level of scrutiny to which the legislation will be sub-

[9] The Michigan Supreme Court suggested (Pet. App. 11a-12a) that, notwithstanding its earlier unanimous ruling in *Chambers*, Michigan employers should have anticipated a legislative amendment to the coordination provision. This Court has recognized, however, that citizens, in planning their affairs in conformity with existing law, "cannot foresee and ought not to be required to guess the outcome of pending measures [in the legislature]." *Untermyer* v. *Anderson*, 276 U.S. 440, 445-446 (1928). In this case, in any event, employers surely had no reason to expect a *retroactive* increase in *past* benefit payments: the 1987 amendment did not contain a retroactive reimbursement clause until eight days prior to its enactment. See Pet. 16 n.5; J.A. 36-46. It may be that, in its reference to notice, the court below had in mind the resolutions passed by the Michigan House and Senate in 1982 interpreting state law to preclude coordination of benefits for persons injured prior to March 31, 1982. See Pet. App. 3a & n.2. But those resolutions were not binding, and the 1982 legislature in fact defeated a proposal—voted on *after* the adoption of the resolutions—that would have amended the law to disallow prospective coordination. See *id.* at 36a-37a & n.16.

Nor were an employer's reasonable expectations left entirely unprotected, as the court below believed (Pet. App. 14a), simply because the employer had not obtained a judgment fixing the amount of its liability. Employers (including petitioners) were involved in extensive litigation to determine their rights under the 1981 statute, which led to the Michigan Supreme Court's controlling decision in *Chambers*. Once the 1981 statute had been so interpreted, there was no reason for employers to litigate the issue further simply to secure a formal judgment; indeed, the court below itself recognized in *Chambers* that employers did not need to resort to the judicial process before coordinating their employees' benefits. See 375 N.W.2d at 726. It would be perverse to hold that employers who conformed completely to the requirements of the 1981 statute and the authoritative decision of the Michigan Supreme Court forfeited the protections of the Contract Clause (or Due Process Clause) merely because they did not reduce their extant state-law rights to judgment.

jected" under the Contract Clause. *Energy Reserves*, 459 U.S. at 411. Because of the substantiality of the impairment in this case, the Court should undertake "a careful examination" (*Allied Steel*, 438 U.S. at 248) of the remaining two factors: the significance and legitimacy of the public purpose supporting the impairment, and the reasonableness of the means adopted by the State to further that purpose. Both factors weigh heavily against the constitutionality of the Michigan enactment.

b. *The Significance And Legitimacy Of The Underlying Public Purpose.* If, as in this case, "the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation." *Energy Reserves*, 459 U.S. at 411. The Michigan Supreme Court concluded that this requirement was met because there was a legitimate "public purpose" for the 1987 amendment: "rather than merely providing a benefit to special interests, the state is validly exercising its police power * * * [in furtherance of the] significant state interest in protecting the right of disabled employees to receive the full compensation intended by the Legislature in return for the relinquishment of their tort claim." Pet. App. 16a.

The Michigan Supreme Court's rather nonchalant and conclusory assertion of a legitimate state interest, if accepted by this Court, would largely eviscerate the protections of the Contract Clause. As the Court explained in *Allied Steel*, "[i]f the Contract Clause is to retain any meaning at all * * * it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, *even in the exercise of its otherwise legitimate police power*." 438 U.S. at 242 (second emphasis added); accord *United States Trust Co.*, 431 U.S. at 21-22; *Wood* v. *Lovett*, 313 U.S. 362, 372 (1941). By looking no further than the presence of "a legitimate state interest" (Pet. App. 17a), the court below collapsed the Contract Clause into the Due Process Clause, contrary to this Court's admonition that "the limitations imposed on States by the Contract Clause" must be "con-

trasted * * * with the less searching standards imposed on economic legislation by the Due Process Clauses." *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 732-733 (1984).

Indeed, in many respects the 1987 amendment was the very type of legislation designed to benefit a discrete and narrow class that this Court has held to violate the Contract Clause. *See Allied Steel*, 438 U.S. at 248-249 ("this law can hardly be characterized * * * as one enacted to protect a broad societal interest rather than a narrow class"); *Energy Reserves*, 459 U.S. at 412 (the Court must ensure that the state is not simply "providing a benefit to special interests"). The 1987 statute did not constitute general legislation that only incidentally affected obligations under various types of private contracts. To the contrary, as Justice Griffin noted in dissent (Pet. App. 50a), the statute was "deliberately designed to disrupt retroactively past transactions" between employers and employees. Thus, as in *Allied Steel*, the statute's "sole effect was to alter contractual duties." *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 192 (1983) (describing *Allied Steel*). This statute therefore stands in marked contrast to that upheld in *Exxon*, which

> did not prescribe a rule limited in effect to contractual obligations or remedies, but instead imposed a generally applicable rule of conduct designed to advance "a broad societal interest" * * *. The prohibition applied to all oil and gas producers, regardless of whether they happened to be parties to sale contracts * * *.

Id. at 191-192. Moreover, again as in *Allied Steel*, the 1987 amendment benefited only a limited and particularized group of employees—here, employees injured prior to 1982 who, alone among all employees, sought to continue to "double dip" despite their receipt of a full array of social security and retirement benefits. See *Cooper* v. *Wicomico County*, 398 A.2d 1237, 1241 (Md. 1979) ("simply to increase the amount of a previously finalized award of compensation to meet the employee's 'generalized need for funds' would appear to rest on a tenuous constitutional foundation").

The Michigan Supreme Court also was unable to point to anything in the legislative history of the 1987 amendment to show that the Michigan legislature determined that it was acting for a significant and legitimate public purpose. The most the court could say was that the legislature "could have reasonably found" that coordination resulted in hardship for certain workers and that the amendment corrected a "perceived inequity." Pet. App. 17a. The court's speculative assumptions, however, cannot cure the lack of a legislative record tying the 1987 amendment to a pressing public need and are insufficient to sustain the statute's substantial impairment of contract. See *Allied Steel*, 438 U.S. at 248 n.19 (declining to accept the state supreme court's "mere speculation as to the state legislature's purpose").

Of course, such speculation is unnecessary here. Simply put, this case arises because the 1987 Michigan legislature reconsidered the 1981 coordination-of-benefits policy in light of 1987 political and economic circumstances (see pages 2-5, *supra*) and, not content to change the policy for the future, purposely acted to upset settled contractual relations by increasing employers' liabilities for closed past periods. Retroactively readjusting contract terms to favor one party over the other is precisely what the Contract Clause forbids.

c. *The Reasonableness Of The Means.* Even "the existence of an important public interest is not always sufficient to overcome th[e] limitation [of the Contract Clause]." *United States Trust Co.*, 431 U.S. at 21. In addition, "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying [the legislation's] adoption." *Id.* at 22; see also *Energy Reserves*, 459 U.S. at 412. In this case, there was absolutely "no showing in the record before us that this severe disruption of contractual expectations [caused by the 1987 amendment] was necessary to meet an important general social problem," and therefore the "presumption favoring 'legislative judgment as to the

necessity and reasonableness of a particular measure' simply cannot stand." *Allied Steel*, 438 U.S. at 247, quoting *United States Trust Co.*, 431 U.S. at 23.

The Michigan Supreme Court concluded that the means chosen by the legislature were reasonable because the 1987 "statute imposes no more retroactive liability than is necessary to" effectuate its goal. Pet. App. 17a. Even a cursory examination of the 1987 amendment, however, reveals that it was not a reasonable way of dealing with any problem that may have faced employees whose benefit levels were not increased by the unrelated statutory changes that took effect at the beginning of 1982.

As the Michigan legislature candidly acknowledged (see page 5, *supra*), the purpose of the 1987 amendment was retroactively to reverse *Chambers*, a decision the legislature declared "to have been erroneously rendered." See Pet. App. 34a-35a (Riley, C.J., dissenting). Apparently realizing that such a rationale could not survive scrutiny under either the Due Process Clause or the Contract Clause, the court below—without any support in the legislative record—hypothesized a new rationale for the law: to provide additional compensation to employees "whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." *Id.* at 17a.

In fact, the fit between this after-the-fact rationale and the 1987 amendment is so poor that it is doubtful the amendment was designed to deal with this issue at all. The 1987 statute helped only the least deserving subset of employees injured prior to 1982—retirees who were able to "double dip" into workers' compensation and retirement benefits. Surely, if the legislature had intended to assist employees whose benefits were not increased in 1982, the 1987 statute would not have been so arbitrarily limited. Instead, it would have more broadly increased the benefit level of *all* employees who were injured prior to 1982. In any event, contrary to the Michigan court's critical assumption, many of the retirees who benefited

from the 1987 amendment had in fact received substantial, non-coordinated increases (ranging from 10.3% to 86.6%) in their workers' compensation benefits in 1982 under the supplemental compensation scheme that went into effect that year. See page 3, note 1, *supra*; *Garvie* v. *Owens-Illinois, Inc.*, 67 Mich. App. 133, 421 N.W.2d 602 (1988). If the goal had been to help only those employees who were not receiving increased benefits, extension of the supplemental benefit program—not retroactive reversal of coordination of benefits—would have been the rational means of accomplishing that end.

In sum, the 1987 amendment was hardly a legislative reaction to a sudden and unanticipated social or economic problem. Rather, it was shaped entirely to reverse a policy decision that had been made in the 1981 statute as authoritatively interpreted by the state supreme court. Although the 1987 legislature was entitled to have a change of heart about whether coordination of benefits should be allowed for employees injured prior to 1982, it had a constitutional duty to "make [the change] prospective, but not retroactive." *Douglass* v. *County of Pike*, 101 U.S. 677, 687 (1880).

This conclusion is strongly reinforced by the consistent line of this Court's decisions holding that, under the Contract Clause, a statutory change in the express or implied terms of a contract may not be applied retroactively to alter obligations that already have been performed and become final. In particular, once the terms of an employment contract have been satisfied, the respective rights of the parties have accrued for that period and are not subject to retroactive modification by a subsequent state statute.

In *Mississippi ex rel. Robertson* v. *Miller*, *supra*, for example, after an official performed services pursuant to a statute specifying his compensation, the statute was amended to reduce the authorized pay for services already rendered. The Court unanimously held that this retroactive interference with accrued contract rights violated the Contract Clause:

> Under the statutes then in force as construed by the highest court of the State, [plaintiff] thereupon became entitled to the specified * * * [compensation]. The retroactive application of [the repealing statute] would take from him a part of the amount that he had theretofore earned. That would impair the obligation of the implied contract under which he became entitled to the commissions.

Robertson, 276 U.S. at 179. See also *Fisk*, 116 U.S. at 134; *Joliffe*, 69 U.S. (2 Wall.) at 457-458.[10]

The Contract Clause principles embodied in these precedents are controlling here. Workers' compensation benefits during 1982-1987 were paid by employers and received by employees in full compliance with then-existing law as authoritatively construed by the Michigan Supreme Court and impliedly incorporated in the employment contracts between the parties. Because those contractual payments had become final and closed, the 1987 amendment could not retroactively increase them.

2. *The Court Should Restore The Original Understanding Of The Contract Clause In Accordance With Its Language, History, And Policies*

As demonstrated above, application of the Court's existing Contract Clause jurisprudence is sufficient to reverse the judgment below. That jurisprudence, however, has been subject to considerable criticism in recent years on the ground that it has strayed from the original understanding of the Clause. See, *e.g.*, *Chicago Bd. of Realtors, Inc.* v. *City of Chicago*, 819 F.2d 732, 743-744 (7th Cir. 1987) (opinion of Posner and Easterbrook, JJ.) ("[t]he Supreme Court * * * has rewritten the contract clause,

[10] For other cases in which the Court has invalidated retroactive statutes under the Contract Clause, see, *e.g.*, *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938); *International Steel & Iron Co.* v. *National Surety Co.*, 297 U.S. 657 (1936); *Treigle* v. *Acme Homestead Ass'n*, 297 U.S. 189 (1936); *W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426 (1934); *Coombes* v. *Getz*, 285 U.S. 434 (1932); and *Pennoyer* v. *McConnaughy*, 140 U.S. 1 (1891).

by inserting the word 'unreasonably' before impairing"); II B. Schwartz, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 306 (1965); E. Corwin, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 362 (1953); Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 598 (1987). Indeed, these criticisms have become so sustained that the Court recently found it necessary to deny that the Clause had become "a dead letter" (*Allied Steel*, 438 U.S. at 241) and that its protections had been "'balanced away'" (*United States Trust Co.*, 431 U.S. at 29 (citation omitted)).

We submit that the Court's current approach is out of harmony with the constitutional text, structure, history, and purpose of the Contract Clause. The seeds of this error may be traced to the analysis (although not the holding) in *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934), in which the Court expressly put aside the literal language of the Contract Clause (*id.* at 428), ignored the context of the Clause and its conjunction with the Ex Post Facto and Bill of Attainder Clauses (*id.* at 426-427), and disregarded the history and purpose of the Clause as being "of little aid" (*id.* at 427). In place of those authoritative guides to constitutional meaning, the Court turned to its "growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare." *Id.* at 442.

Blaisdell itself was a narrow decision, upholding by a 5-4 vote a Minnesota emergency moratorium on mortgage foreclosures in response to the post-depression crisis facing the State and the country. In so ruling, the Court repeatedly stressed the "temporary" and "emergency" nature of the provision (290 U.S. at 416, 439-440, 444-445) and rested its decision on "the relation of emergency to constitutional power." *Id.* at 425. Indeed, within a few months of *Blaisdell*, the Court unanimously invalidated an Arkansas statute under the Contract Clause, explaining

that, unlike the Minnesota statute, the Arkansas law was not intended to deal with an emergency and was "neither temporary nor conditional." *W.B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 434 (1934).

Despite the limited nature of the *Blaisdell* holding, the Court subsequently has construed the decision to authorize a multi-factor balancing approach in assessing challenges to state legislation under the Contract Clause. See, *e.g.*, *Veix* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 505 (1987). During the first 150 years of the Nation's existence, by contrast, the Clause was construed as a virtually "absolute bar" to retroactive impairments of contractual obligations (*United States Trust Co.*, 431 U.S. at 19 n.17) and was "perhaps the strongest single constitutional check on state legislation." *Allied Steel*, 438 U.S. at 241; see also *Keystone Coal*, 480 U.S. at 502. These decisions reflect "the high value the Framers placed on the protection of private contracts" (*Allied Steel*, 438 U.S. at 245) and the Contract Clause's "important place in our constitutional jurisprudence" (*United States Trust Co.*, 431 U.S. at 15).

In restoring the Contract Clause to its proper place in the constitutional structure, the appropriate starting point is the text of the Constitution. Article I, Section 10, Clause 1 provides in pertinent part:

> No State shall * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts * * *.

The language of the Contract Clause is straightforward; although the Clause, like all constitutional provisions, is subject to judicial interpretation, it surely gives no suggestion of the kind of balancing test employed in the Court's modern decisions.[11] Moreover, the placement of

[11] Other provisions of the Constitution, by contrast, are drawn in qualified or conditional terms. For example, Article I, Section 10, Clause 2 prohibits a state (without the consent of Congress) from "lay[ing] any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws." And of course the Fourth Amendment forbids "unreasonable" searches and seizures, while the Eighth Amendment bars "excessive" bail and "excessive" fines. Thus, the Framers well knew how to draft appropriate language when they intended to create flexibility or exceptions.

the Contract Clause with the Bill of Attainder and Ex Post Facto Clauses—both of which have been applied by the Court in accord with their language—reinforces the text of the Contract Clause and illuminates the constitutional values that the Clause protects.[12] See Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HAST. CONST. L. Q. 525, 544 (1987); Palmer, *Obligations of Contract: Intent and Distortion*, 37 CASE W. RES. L. REV. 631, 635-646 (1987).

In general, the Framers of the Constitution sought to promote the stability of society through the rule of law. James Madison, for example, inveighed against the "calamit[ies]" of "mutable policy"; in such circumstances, he objected, "no man, who knows what the law is today, can guess what it will be tomorrow." FEDERALIST NO. 62 (Madison), at 381 (C. Rossiter ed. 1961). As Madison explained, this concern over "the fluctuating policy which has directed the public councils" specifically underlay the Contract Clause.

> The sober people of America * * * have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. * * * They very rightly infer, therefore, that some thorough reform is wanting, which will * * * give a regular course to the business of society.

[12] In fact, Madison discussed together and treated as an integrated provision the prohibitions against bills of attainder, ex post facto laws, and impairments of contract, regarding all three types of legislation as "contrary to the first principles of the social compact and to every principle of sound legislation." FEDERALIST No. 44, at 282 (C. Rossiter ed. 1961).

FEDERALIST NO. 44, at 282-283. Alexander Hamilton likewise supported the Clause as an " 'eagerly embraced' " " 'preventative' " against " '[t]he too frequent intermeddlings of the state legislatures in relation to private contracts.' " C. Beard, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 180 (1961) (citation omitted).

The debates over the Contract Clause at the Constitutional Convention reveal the Clause's essential nature. See generally McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 278-281 (1988). The Clause originated in a proposal by Rufus King of Massachusetts. In support of the Clause, James Wilson of Pennsylvania explained that "*retrospective* interferences only are to be prohibited." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 440 (M. Farrand ed. 1911). At that point Madison inquired whether such protection was provided by the prohibition of ex post facto laws, and Edward Rutledge of South Carolina then successfully moved a substitute provision to bar states from enacting ex post facto laws and bills of attainder. The next day, however, John Dickenson of Delaware noted that Blackstone had limited ex post facto laws to criminal statutes and that under that interpretation the Constitution "would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite." 2 RECORDS OF THE FEDERAL CONVENTION, at 448-449. Thereafter, the Committee on Style proposed the Contract Clause in its current form, which the Convention adopted without further debate.

This constitutional history demonstrates that the Contract Clause—like the Ex Post Facto Clause from which it was derived and with which it is joined—was designed to promote stability and predictability by absolutely prohibiting *retroactive* changes in the governing law. See *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798); *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 212 (1827); S. Miller, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 536 (1893) ("[t]he objectionable feature of the legislation which we have discussed, where a legislative body attempted to exercise some authority over existing contracts, was that it was retrospective or retroactive"); Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887, 918 (1982) ("[t]he vice the Framers had meant to attack [in the Contract Clause] was retroactive legislation"); Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 SUP. CT. REV. 95, 114 ("the Contract Clause was intended to fill the gap as an ex post facto clause on the civil side, at least so far as contractual obligations were concerned"). By guarding against retroactive interference with contractual rights, the Contract Clause was designed to be a "centerpiece" of the constitutional protection of private rights (L. Tribe, AMERICAN CONSTITUTIONAL LAW 588 (2d ed. 1988)) and was, as Charles Pinckney of South Carolina observed at the time, " 'the soul of the Constitution.' " McConnell, 76 CALIF. L. REV. at 284 (citation omitted).[13]

Retroactive laws are of two types. Some laws are purely retrospective: they "reach 'back to attach new legal rights and duties to already completed transactions.' * * * [Such a statute] alters the legal consequences of past events *as of the time of those events*," McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CALIF. L. REV. 12, 58-59 (1967) (emphasis in original), quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV.

[13] The Framers were well familiar with the general principle that legislatures are to enact prospective statutes. See, *e.g.*, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 136 (1810); *Calder* v. *Bull*, 3 U.S. (3 Dall.) at 388, 397. As one leading commentator has described the prevailing English and American law at the time: "Retroactive laws were held to be oppressive and unjust, and it was maintained that the essence of a law was that it be a rule for the future." Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 780, 789 n.42 (1936).

692, 692 (1960). An example of a purely retroactive enactment is a "law making prior contracts, valid when signed, invalid for all purposes from the date of execution." McNulty, 55 CALIF. L. REV. at 58 n.144. As Justice Scalia has explained, this type of retroactive law "alter[s] the *past* legal consequences of past actions" and "change[s] what was the law in the past." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 219, 220 (1988) (Scalia, J., concurring). Such a law may be said to be retroactive in the "primary" (or "strong") sense of the term.

Other laws contain elements of both retroactivity and prospectivity. They "purport to have only post-enactment effect [but]may also be classified as retroactive insofar as they bear importantly on prior events by affecting their future legal consequences as of the time the new law is adopted. Such retroactivity is illustrated by a statute declaring pre-existing obligations unenforceable in the future." McNulty, 55 CALIF. L. REV. at 59. These laws are retroactive in the "secondary" (or "weak") sense of the term.

Laws that operate retroactively in the primary sense to impair contractual obligations should be held to violate the Contract Clause without more. In the criminal context, those laws plainly would violate the Ex Post Facto Clause, and they entail exactly the evil—a retroactive change in the governing legal rules—that the Contract Clause was intended to guard against. In light of the language and history of the Contract Clause, it is difficult to conceive of a legitimate justification for such purely retrospective laws. See Kmiec & McGinnis, 14 HAST. CONST. L. Q. at 544; Merrill, 37 CASE W. RES. L. REV. at 629; see also *Kaiser Aluminum* v. *Bonjorno*, 110 S. Ct. 1570, 1586 (1990) (Scalia, J., concurring) ("[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal" and "has long been a solid foundation of American law").

This Court consistently has invalidated laws that are retroactive in the primary sense. See page 28 & n.10, *supra*.

Laws that are retroactive in the secondary sense are less amenable to categorical characterization. On the one hand, such laws, by establishing new legal consequences for previously arranged activities, often do upset reasonable contractual expectations and thus come within the concerns as well as the text of the Contract Clause. See, *e.g.*, *International Steel & Iron Co.* v. *National Surety Co.*, 297 U.S. 657 (1936) (statutory release of surety bond, as applied to contractual bonds in existence when statute was enacted, violates Contract Clause); *Edwards* v. *Kearzey*, 96 U.S. 595 (1877) (statutory increase in debtor's property exempt from creditor remedies, as applied to contracts existing when statute was enacted, violates Contract Clause). As retrospective legislation, they should be subject to stricter scrutiny and call for a substantially greater governmental justification than this Court's modern cases have required; for private as for public contracts, a state should not be "free to consider impairing the obligations of * * * contracts on a par with other policy alternatives." *United States Trust Co.*, 431 U.S. at 30-31. See also *id.* at 32 (Burger, C.J., concurring).[14]

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[14] It bears emphasis that the Framers adopted the Contract Clause despite objections that it would unduly restrict state authority. See McConnell, 76 CALIF. L. REV. at 278-279. For example, Gouverneur Morris of Pennsylvania opposed the Clause on the ground that it was "going too far" and that the "majority must rule." 2 THE RECORDS OF THE FEDERAL CONVENTION, at 439-40. George Mason of Virginia also took issue with the Clause, arguing that "[t]his is carrying the restraint too far. Cases will happen that can not be foreseen, where some kind of interference will be proper, & essential." *Ibid.* See also *ibid.* (Madison acknowledged that "inconveniences might arise" from the Clause but believed that "on the whole it would be overbalanced by the utility of it"). And Luther Martin, who had been a member of the Constitutional Convention, objected in the Maryland House of Delegates that "there might be times of such great public calamities and distress * * * as should render it the duty of a government * * * to inter-

On the other hand, there is an unquestioned need for the states, in the exercise of their legitimate police power, to be able to regulate *future* conduct even if that may interfere with some contractual expectations. The rule is rightly established that private parties cannot, through foresightful contracting, obtain absolute immunity from otherwise proper state authority. See, *e.g.*, *Allied Steel*, 438 U.S. at 241-242; *Blaisdell*, 290 U.S. at 435-436. For example, consistent with the Contract Clause, a state may prohibit activities that are contrary to the public health and safety notwithstanding existing private contracts to engage in such (previously lawful) conduct. See, *e.g.*, *Beer Co.* v. *Massachusetts*, 97 U.S. at 25 (1877).

This general analysis need not be elaborated further here, for the core principle is sufficient for the Court to dispose of this case. The 1987 amendment was a retroactive statute in the primary sense: it applied a new rule of law to past transactions that were governed by a different rule at the time they were conducted. As such, it was, under the foregoing standard, a plain violation of the Contract Clause.

In the end, this case turns out to be an easy one under either the existing Contract Clause standard or under an approach more faithful to the origins of the Clause. But the justification for returning to the original understanding of the Clause extends well beyond the outcome of this particular litigation. By applying that understanding to invalidate the 1987 amendment, the Court will provide important guidance to the lower courts and begin the process of returning the Contract Clause to its intended role in our constitutional system.

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fere"—a power that concededly, however, "ought only to be exercised on very important and urgent occasions." 3 THE RECORDS OF THE FEDERAL CONVENTION, at 214-215. This history strongly indicates that the Contract Clause was understood to be quite stringent if not absolute in its prohibition; at the least, a permissive balancing test has no support in the historical record. See Note, *A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918, 924 n.23 (1984) ("[m]odern courts have ignored the fact that Madison's views, not Martin's, prevailed at the Constitutional Convention").

II. THE 1987 MICHIGAN AMENDMENT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. Purely Retroactive Laws That Change The Legislative Policy Governing Completed Transactions Violate Due Process

Much that we already have said serves to establish the 1987 amendment's inconsistency with the substantive requirements of the Fourteenth Amendment's Due Process Clause. This Court long has recognized that considerations of reliance and legitimate expectations must be taken into account in assessing the constitutionality of retroactive legislation under the Clause; while due process principles necessarily accord legislatures substantial leeway in drafting laws that bear on economic interests, affected parties nevertheless can, as Judge Learned Hand explained, "expect * * * that courts will intervene when the defeat of their expectations passes any measure that reasonable persons could think tolerable." *Cohan* v. *Commissioner*, 39 F.2d 540, 545 (2d Cir. 1930). Judged by this standard, the 1987 amendment plainly "is so harsh and oppressive as to transgress the constitutional limitation." *Welch* v. *Henry*, 305 U.S. 134, 147 (1938).

In assessing the constitutionality of the 1987 amendment, its remarkable character bears emphasis. As Chief Justice Riley explained (Pet. App. 46a), the 1987 Michigan legislature decided that its 1981 predecessor simply put the wrong policy in place when it chose to coordinate workers' compensation benefits for employees injured prior to 1982. The 1987 legislature accordingly transported itself back in time by enacting what the Michigan Supreme Court acknowledged to be a "'purely retroactive'" statute (*id.* at 11a) that reopened and reassessed long-settled transactions under a new rule of law. And the legislature did so, as Justice Brickley explained, "notwithstanding the fact that those rights and liabilities had already been determined by an earlier and different body of agents of an earlier majority, determinations which the Legislature in 1983, 1984, 1985 and 1986 declined to change." *Id.* at 27a.

Legislation of this sort works an extraordinary interference both with the settled expectations of affected parties and, more generally, with what Justice Story described as "the fundamental principles of the social compact." 2 J. Story, COMMENTARIES ON THE CONSTITUTION 272 (5th ed. 1891). If the 1987 amendment is as easily supportable as the court below imagined, legislators would be free to determine, for example, that their long-ago predecessors had erred in cutting tax rates, and could remedy the perceived error by requiring taxpayers to recalculate many years worth of tax liability as though different rates had been in effect throughout the intervening period. Indeed, the principle represented by the 1987 amendment logically would mean that a newly installed legislature could "'recount' * * * all legislative voting that had occurred during the preceding two years, substituting the votes of the new representatives for those of their predecessors" (Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 445); by providing that the views of the new legislators should be treated as having been in effect for the prior two years, the sitting legislature could retroactively recast the entire legal landscape.

That sort of rootless lawmaking fails the fundamental test of due process: it disregards considerations of fairness derived from "'the basic values that underlie our society.'" *Michael H.* v. *Gerald D.*, 491 U.S. 110, 122-123 (1989) (plurality opinion) (citation omitted). After all, as our discussion above makes clear, "nothing seems more basic to the existence of a legal order than the ability to rely upon the actions of others, including the government, with some assurance." Slawson, *Constitutional and Legislative Considerations in Retroactive Rulemaking*, 48 CALIF. L. REV. 216, 225 (1960).

1. *Purely Retroactive Legislation Is Presumptively Unconstitutional*

a. *Purely Retroactive Laws Are Unconstitutional When They Change Legislative Policy.* The rules governing the constitutionality of statutes such as the 1987 amendment, in which the legislature determined that its predecessor adopted the wrong policy and therefore retroactively changed the law governing *past* conduct, have long been settled. In the leading case concerning such retroactive legislation, *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922), local authorities collected a toll from a ship passing through a canal, although they lacked statutory authority to do so. Two years later, as a refund suit was proceeding, the state legislature enacted a statute purporting retroactively to validate collection of the toll—a statute that, like the one at issue here, modified liability attaching in the past to a completed transaction. See *id.* at 338-339. This Court held the statute unconstitutional.

Writing for a unanimous Court, Justice Holmes explained:

> [I]f the [state legislature] had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal, that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls.

258 U.S. at 339. Distinguishing cases like *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907), where a legislature was permitted retroactively to cure a defect in a statute by conforming a tariff to past administrative practice, the Court in *Forbes* explained that retrospective ratification of administrative acts is supportable only when the party opposing retroactivity is seeking to take advantage of "some slight technical defect" in the existing legislation or is advancing a position that is "contrary to some strongly prevailing view of justice." 258 U.S. at 339.

In subsequent years the Court has continued to draw this line between permissible, "curative" ratification of administrative practice and unconstitutional attempts retroactively to change the basic thrust of legislation.

In *Graham & Foster* v. *Goodcell*, for example, the Court stated that "a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects *in the administration of government* where the remedy can be applied without injustice." 282 U.S. 409, 429 (1931) (emphasis added). And more recently, Justice White (joined by Justice Blackmun) explained that "*Heinszen* and *Forbes* appear to stand for the proposition that administrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively." *Van Emmerik* v. *Janklow*, 454 U.S. 1131, 1133 (1982) (White, J., dissenting from dismissal of appeal). The rationale for this distinction is clear enough: reliance interests are not threatened when curative legislation, by ratifying "[l]ong-continued and substantial administrative and private conduct," simply "restores a situation that was affirmatively anticipated and provided for." Slawson, 48 CALIF. L. REV. at 238, 239. Needless to say, that is not the case when the retroactive law involves a fundamental and unexpected change in legislative policy.

This reluctance to undo settled transactions through retroactive legislation that changes settled policy is reflected in almost universal legislative and judicial practice. For over a century, Congress and the state legislatures have given *limited* retroactive effect to tax and related statutes; that practice precludes persons from arranging their affairs to evade the impact of pending (and thus anticipated) legislation. See, *e.g.*, *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 731 (1984); *United States* v. *Darusmont*, 449 U.S. 292, 296-297 (1981). But so far as Congress is concerned, "[t]his 'retroactive' application apparently has been confined to short and limited periods required by the practicalities of producing national legislation." *Ibid.*

Indeed, the furthest the Court has gone in upholding the constitutionality of *any* such retroactive law, state or federal, is *Welch* v. *Henry*, *supra*, where a taxpayer received dividend income in 1933 and filed an income tax return in 1934; the state legislature, which sat in odd-numbered years, imposed a tax on the dividend income in 1935, at its next general legislative session. See 305 U.S. at 142, 150-151. In affirming the 1935 tax statute's constitutionality, the Court emphasized that the legislature had enacted the law "at the first opportunity after the tax year in which the income was received." *Id.* at 151. The Court explained that, "in view of well established legislative practice, both state and national, taxpayers could not

> justly assert surprise or complain of arbitrary action in the retroactive apportionment of tax burdens to income *at the first opportunity* after knowledge of the nature and amount of the income is available. And we think that the "recent transactions" to which this Court has declared a tax law may be retroactively applied must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment.

Id. at 149-150 (emphasis added) (citation omitted). The Court added that, "[w]hile the [state supreme court below] thought that the present tax might 'approach or reach the limit of permissible retroactivity,' we cannot say that it exceeds it." *Id.* at 151.

Welch appears to mark the outer boundary of permissible purely retroactive legislation. Other than legitimate "curative" cases such as *Heinszen*, there is no decision of this Court—and (with the exception of the ruling below) we are not aware of any decision of any other court [15]—affirming the authority of a legislature to reach back beyond the session of its immediate predecessor. To

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[15] None of the various federal decisions cited by Justice Brickley (see Pet. App. 24a) involved purely retroactive laws analogous to the 1987 amendment; they considered legitimate curative legislation or laws imposing prospective burdens.

the contrary, several courts have expressly held that such a temporal limit is compelled by the dictates of due process. See *Washington Nat'l Arena Limited Partnership* v. *Treasurer*, 410 A.2d 1060, 1064 & n.3 (Md. 1980); *Commonwealth* v. *Budd Co.*, 108 A.2d 563, 568-569 (Pa. 1954). There is no reason to doubt that this remains the law; in its most recent analysis of the issue, the Court, citing *Welch*, explained that "beyond some temporal point the retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limitation.'" *McKesson Corp.* v. *Division of Alcoholic Beverages*, 110 S. Ct. 2238, 2252 n.23 (1990). This nearly universal disfavor for purely retroactive legislation reaching back beyond a legislative term bears strongly on the due process inquiry: it suggests that such laws disturb interests that are "deeply rooted in reason and in the compelling traditions of the legal profession." *Rochin* v. *California*, 342 U.S. 165, 171 (1952).

b. *Purely Retroactive Laws Burden Legitimate Expectations.* The suspect status of purely retroactive statutes is simply an application of the broader recognition that the destruction of expectations—and the legitimacy of public reliance on the undertakings of government—may call into question the fundamental fairness of statutes having retroactive consequences. In its recent decisions, the Court has upheld the constitutionality of laws according *prospective* effects to past conduct—what we have described above (see page 34, *supra*) as laws that are retroactive in the "secondary" sense—by inquiring into the rationality of the legislation. See *United States v. Sperry Corp.*, 110 S. Ct. 387, 390-391, 392 (1989); *United States* v. *Locke*, 471 U.S. 84, 105-106 (1985); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976). But as Justice Scalia has noted, the scrutiny even in such cases has involved "a rationality requirement beyond that applied to other legislation." *Bowen*, 488 U.S. at 223 (Scalia, J., concurring).

In particular, the Court consistently has suggested that considerations of notice and "reliance upon the current state of the law" must be taken into account in assessing the validity of retroactive legislation. *Turner Elkhorn*, 428 U.S. at 17. See *id.* at 17 n.16; *id.* at 41 (opinion of Powell, J.). The Court thus several times has struck down statutes that imposed unanticipated taxes on past transactions. *Helvering* v. *Helmholz*, 296 U.S. 93, 97-98 (1935); *Coolidge* v. *Long*, 282 U.S. 582, 596, 605-606 (1931); *Untermyer* v. *Anderson*, 276 U.S. 440, 444-445 (1928); *Nichols* v. *Coolidge*, 274 U.S. 531, 543 (1927). Of course, an inquiry that looks to reliance interests necessarily involves something more than a simple application of the "rational basis" test—at least in its usual sense of finding a general congruence between statutory means and ends—because a legislature may have rational purposes for enacting a retroactive statute notwithstanding the existence of demonstrable reliance interests in existing law. This suggests that, even with regard to laws attaching prospective consequences to past conduct, a balancing of public and private interests (of the sort conducted in other substantive due process settings) may be appropriate.[16]

However that may be, the reasons for treating purely retroactive legislation as at least presumptively unconstitutional are manifest. The exigencies of governing require that lawmakers have the authority to adapt prospective legislation to existing circumstances, even though such legislation may disrupt expectations; "constitutional principles must leave some play to the joints of the machine." *Forbes*, 258 U.S. at 340. And the understanding that legislatures may take such prospective action (or impose limited retroactivity to prevent the evasion of pending legislation) serves to obviate somewhat the role of reliance in such cases. See *Darusmont*, 449 U.S. at 297; *Welch*, 305 U.S. at 149-150.

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[16] See, *e.g.*, *In re Marriage of Fabian*, 224 Cal. Rptr. 333, 337-340 (Cal. 1988); *Lawrence* v. *Anheuser-Busch, Inc.*, 523 A.2d 864, 871 (R.I. 1987). Cf. *Youngberg* v. *Romeo*, 457 U.S. 307, 320 (1982).

In contrast, the usual operation of government hardly requires the reformulation of rules in a manner, as Justice Griffin described the 1987 amendment, "deliberately designed to disrupt retroactively *past* transactions." Pet. App. 50a (emphasis added). At the same time, affected parties surely will have relied on the finality of transactions that were closed long before the current legislature came into being; those transactions and their consequences will have worked their way into the fabric of the parties' subsequent actions. In addition, the invalidation of purely retroactive legislation does not call for the exercise of subjective judgment by the judiciary, a concern that has troubled the Court in other contexts involving substantive due process. See *Michael H.*, 491 U.S. at 121-122 (plurality opinion). To the contrary, judicial disfavor of such legislation "reinforces rather than subverts representational decisionmaking" by giving effect to the choices made by the then-sitting legislature to govern contemporaneous transactions. Eule, 1987 AM. B. FOUND. RES. J. at 446. As Justice Brickley aptly observed, it is purely retroactive legislation itself, not its judicial invalidation, that poses the greater threat "to our system of republican government." Pet. App. 22a.

2. *The 1987 Amendment Does Not Comport With The Requirements Of Due Process*

Application of these principles to the 1987 amendment establishes the law's unconstitutionality. As the Michigan Supreme Court acknowledged, the statute is purely retroactive (see Pet. App. 9a, 11a); it is precisely equivalent in its effect to a retroactive tax increase going back five years across four legislative sessions. And as we have explained (see pages 18-19, *supra*), Michigan employers plainly relied on then-existing law in making their pricing and related business decisions, in setting levels of compensation, in implementing investment choices, and in providing for the funding of their insurance obligations. The court below conceded that "the employers in this case held an expectation that the payments were completed transactions" (Pet. App. 9a), although it went on to

hold that those expectations were legally irrelevant to the due process analysis. *Id.* at 9a-11a. That legal conclusion, however, cannot be reconciled with this Court's decisions discussed above.

Moreover, despite the "curative" label placed on the 1987 amendment by the state legislature (see Pet. App. 12a), the statute cannot be saved as an attempt to ratify administrative practice or conform the law to the general understanding, as was true in *Heinszen*; "[t]o say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts." *Forbes*, 258 U.S. at 340. In fact, petitioners immediately understood the 1981 law to permit coordination of benefits for workers injured before March 31, 1982, and a unanimous Michigan Supreme Court subsequently confirmed that understanding in *Chambers*. Thus, as Chief Justice Riley noted (and the majority below did not dispute), "the legislative history of [the 1981 law] clearly contradicts the claim of the 1987 Legislature that [the 1987 amendment] provided the original intent of the 1981 Legislature." Pet. App. 37a. As a law that effectuates a naked change in approach, the 1987 amendment accordingly runs afoul of the principle that "legislative policy may not be changed retroactively" in the guise of curative legislation. *Van Emmerik*, 454 U.S. at 1133 (White J., dissenting from dismissal of appeal).

The Michigan Supreme Court's principal response to these points was its assertion that liability for workers' compensation may be retroactively modified because, as a matter of state law, the entitlement to specific levels of compensation is set by statute and therefore is not "vested" (Pet. App. 12a-13a). The court added that judgments entered under the 1981 law *are* vested and therefore "are immune from this legislative modification." *Id.* at 14a. That state law permits the legislature *prospectively* to modify (or eliminate) entitlement to workers' compensation, however, hardly establishes that the imposition of many years' worth of *retroactive* monetary

liability comports with due process. In fact, the distinction drawn by the court below—and, in this setting, the concept of "vesting" itself—is not meaningful.

As a leading commentator has observed, "it has long been recognized that the term 'vested right' is conclusory —a right is vested when it has been so far perfected that it cannot be taken away by statute." Hochman, 73 HARV. L. REV. at 696. Thus, while references to vested rights occasionally appear in this Court's retroactivity decisions (see, *e.g.*, *Welch*, 305 U.S. at 147; *Graham & Foster*, 282 U.S. at 429; *Coolidge*, 282 U.S. at 596), the term apparently has been used to signify nothing more than that the relevant transactions had been completed at the time that the retroactive legislation was enacted.[17] That certainly is the case here: petitioners had long since paid workers' compensation for particular periods, as required by statute, thus fully satisfying their then-current obligations. And so far as reliance (the only relevant consideration) is concerned, it cannot possibly matter that petitioners, after litigating the issue and obtaining an authoritative judgment from the state's highest court settling the conformity of their conduct with the law, failed to take the pointless step of reducing each of their individual workers' compensation obligations to judgment. See page 22, note 9, *supra*.

The final ground offered by the court below to justify retroactivity—that the 1987 amendment affects the amount of benefits rather than the employers' basic obligation to pay (see Pet. App. 13a)—is equally insubstantial. This Court has drawn that distinction in holding statutes *unconstitutional* when they retroactively imposed levies on voluntary transactions that previously had been

[17] State courts have applied the concept in that way in striking down retroactive laws. See, *e.g.*, *Thorp* v. *Casey's General Stores*, 446 N.W.2d 457, 462-463 (Iowa 1989); *Potomac Hospital Corp.* v. *Dillon*, 329 S.E.2d 41, 45 (Va. 1985); *State ex rel. Briggs & Stratton Corp.* v. *Noll*, 302 N.W.2d 487, 491-493 (Wis. 1981); *Brown* v. *Commonwealth*, 566 A.2d 913 (Pa. Commw. Ct. 1989).

entirely exempt from taxation, even when the retroactivity reached only to periods falling within the session of the *enacting* legislature; in contrast, the Court has held that increases in the rates of existing taxes during such periods may be anticipated and therefore are consistent with due process. See *Welch*, 305 U.S. at 147; *Untermyer*, 276 U.S. at 445; *Nichols*, 274 U.S. at 542. See generally *Turner Elkhorn*, 428 U.S. at 17 n.16. That principle obviously does not justify the wholly unprecedented (and thus, necessarily, unexpected) increase in rates for periods many years in the past.

The Michigan Supreme Court also purported to find support in this Court's decisions in *Turner Elkhorn* and *Gray* (see Pet. App. 7a-12a), but it plainly misread those decisions. The court below suggested that the legislation at issue in *Turner Elkhorn* altered "liability for past, completed transactions." *Id.* at 11a. In fact, however, that legislation attached *prospective* consequences to past events by requiring compensation for future periods of disability; "the effect of the legislation is to impose a *new* duty or liability based on past acts." 428 U.S. at 15-16 (emphasis added). For its part, *Gray* is an unexceptional application of the principle that retroactivity is permissible if " 'confined to short and limited periods' " so as to "prevent [affected parties] from taking advantage of a lengthy legislative process * * * while Congress debated necessary revisions in the statute." 467 U.S. at 731 (citation omitted). For reasons we have already discussed, that situation bears no resemblance to this case.[18]

[18] We recognize that *Gray* contains language indicating that due process is satisfied "[p]rovided that retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means." 467 U.S. at 729. But *Gray* cannot plausibly be read to eschew altogether consideration of reliance in assessing the constitutionality of retroactive legislation—a holding that would have overruled decisions such as *Helmholz* and *Untermyer*. Indeed, *Gray* itself left open (albeit with some lack of enthusiasm) whether timely notice of pending retroactive legislation is constitutionally required. See *id.* at 731-732. And Justice Brennan, author of the Court's opinion in *Gray*, subsequently noted for

B. The 1987 Amendment Is Arbitrary And Irrational

Because the 1987 amendment is retroactive in the primary sense, stretches back many years to impose a new rule of law on closed transactions, and severely upsets settled expectations, it should be held to violate the Due Process Clause without more. In any event, the relationship between the statute's means and ends is so inexact—and the lines the law draws are so "arbitrary and irrational" (*Turner Elkhorn*, 428 U.S. at 15)—that the amendment cannot survive application even of the ordinary rational basis test, as applied to retroactive legislation.

That conclusion is confirmed by the Court's decision in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935). There, observing that the law at issue "resurrect[ed] for new burdens transactions long since past and closed" (*id.* at 350), the Court invalidated retroactive legislation requiring employers to finance pensions for former railroad employees who, while not employed by a railroad at the time of the statute's enactment, had been so employed during the prior year. See *id.* at 344-345. Chief Justice Hughes and Justices Brandeis, Stone, and Cardozo (while dissenting on other points) agreed that this retroactive feature of the legislation was "arbitrary" and therefore unconstitutional. *Id.* at 389 (Hughes, C.J., dissenting).

The Court in *Turner Elkhorn* distinguished *Alton* on the ground that, unlike the discredited railroad pension legislation, "[t]he point of the black lung benefit provisions [at issue in *Turner Elkhorn*] is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee la-

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a unanimous Court in *McKesson* that purely retroactive legislation may "violate due process by unduly interfering with settled expectations." 110 S. Ct. at 2252 n.23. The 1987 amendment, of course, does precisely that.

bored." 428 U.S. at 19. See also *Gray*, 467 U.S. at 733. Here, however, *Alton* is squarely on point. While in terms modifying the workers' compensation program, the 1987 amendment did not respond to "a specific need created by the dangerous conditions under which the former employee labored." To the contrary, in its actual operation the statute does nothing more than permit retirees to "double dip" by collecting full pension *and* full workers' compensation benefits—in effect, as in *Alton*, "increas[ing] or supplement[ing] a former employee's salary to meet his generalized need for funds." *Turner Elkhorn*, 428 U.S. at 19; see *Gray*, 467 U.S. at 733.

Indeed, the 1987 amendment goes well beyond the provision held unconstitutional in *Alton*. The railroad retirement law attached prospective consequences to past terms of employment; the statute at issue here, of course, is purely retroactive. And while the Court has reserved judgment on the continuing vitality of *Alton* (see *Turner Elkhorn*, 428 U.S. at 19; *Gray*, 467 U.S. at 733), the decision reached in that case by a unanimous Court surely compels the conclusion that, absent some special need, it is arbitrary for a legislature retroactively to require that employers increase general levels of compensation.

That the 1987 amendment does not rationally serve the purposes attributed to the legislature is made clear by the notable lack of congruence between the statutory means and ends. The Michigan Supreme Court hypothesized that the intended beneficiaries of the 1987 statute are workers "who did not receive the increases in the legislative reform packages of 1980 and 1981" (Pet. App. 9a; see *id.* at 17a), a group that includes all persons injured prior to 1982. But the statute does not target its benefits to the entire class of persons in that category. Instead, it assists only those workers who were injured during the relevant period *and* who fortuitously were eligible to collect their pensions. As we explain above (see pages 26-27, *supra*), those "double-dippers" were the group *least* in need of increased assistance.

At the same time, the size of the retroactive payments mandated by the 1987 amendment belies the law's hypothesized purpose. Workers' compensation payments are geared to weekly wage loss, thus compensating for lost earnings. Payments under the 1987 amendment, however, are measured by the size of the workers' pensions, sums that have no necessary relation to the wages lost during periods for which compensation is due. In these circumstances, the mismatch between the statutory means and ends is so great as "necessarily [to] cast[] considerable doubt upon the proposition that the [law] could rationally have been intended" to serve the goals assumed by the state court. *Department of Agriculture* v. *Moreno*, 413 U.S. 528, 537 (1973). See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 440 (1982) (opinion of Blackmun, J.).

CONCLUSION

The judgment of the Supreme Court of Michigan should be reversed.

Respectfully submitted.

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